C v Chief Constable of the Police Service of Scotland: some thoughts on privacy, proportionality and police constables

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This is a pre-copyedited, author-produced version of an article accepted for publication in Juridical Review following peer review. The definitive published version

Grant, F. (2020) ‘C v Chief Constable of the Police Service of Scotland: some thoughts on privacy, proportionality and police constables’. *Juridical Review* 42(1): pp. 42-53.

is available online on Westlaw UK.

Case and Comment

B C and Others v Chief Constable Police Service of Scotland and Others [2019] CSOH 48

Some thoughts on privacy, proportionality and police constables

1. Introduction

On the 28th June 2019 Lord Bannatyne issued his judgment in *B C and Others v Chief Constable Police Service of Scotland and Others*.[1] The case proceeded on the basis of judicial review where it was the petitioners' position that the respondents had engaged in conduct incompatible with their European Convention on Human Rights [ECHR] art.8(1) right to respect for private and family life, home and correspondence and their common law right of privacy.[2] Whilst the first head of claim necessitated consideration and discussion of Strasbourg and domestic jurisprudence, interpreting art.8(1), decisions of the English courts which have developed the common law of breach of confidence to recognise a right of privacy as a fundamental and free-standing right are also of significance given the petitioners' novel argument that, in addition to rights conferred by the Convention, a right of privacy also exists at common law in Scotland.

2. The Facts

The petitioners were serving police constables facing misconduct proceedings per the Police Service of Scotland (Conduct) Regulations 2014.[3] It was alleged they had sent and received messages between themselves and others via two WhatsApp[4] private messaging groups the content[5] of which fell afoul of the Standards of Professional Behaviour detailed in the 2014 Conduct Regulations and further restrictions placed on police constables by sch.1 of The Police Service of Scotland Regulations 2013[6] viz.;

> "A constable must at all times abstain from any activity which is likely to interfere with the impartial discharge of that constable's duties or which is likely to give rise to the impression amongst members of the public that it may so interfere."

Misconduct proceedings commenced after a colleague[7] of the petitioners, when investigating allegations of sexual offences made against another police constable (for the avoidance of doubt,

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[1] *B C and Others v Chief Constable Police Service of Scotland and Others* [2019] CSOH 48.
[2] See the Human Rights Act 1998 [HRA] sch.1, art.8(1).
[3] Police Service of Scotland (Conduct) Regulations 2014 (SSI 2014/68) para.1, sch.1. (2014 Conduct Regulations).
[4] WhatsApp is an "end- to- end" encryption messaging service (currently) owned by Facebook that "ensures only ... [the sender] and ... [the recipient(s)] can read what is sent, and nobody in between, not even WhatsApp. This is because ... messages are secured with a lock, and only the recipient and... the sender have the special key needed to unlock and read them." https://www.whatsapp.com/security/ [Accessed 16 November 2019]. For a detailed discussion of end –to- end encryption see J. A. Lewis, D. E. Zeng, W. A. Carter, *The Effect of Encryption on Lawful Access to Communications and Data*, A Report of the Center for Strategic & International Studies (CSIS) Technology Programme (2017) ISBN: 978-1-4422-7995-7 available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/organized-crime-and-human-trafficking/encryption/csis_study_en.pdf [Accessed 16 November 2019].
[5] *B C and Others,* [2019] CSOH 48 at [166].
[6] The Police Service of Scotland Regulations 2013, (SSI 2013/35). (2013 Police Service Regulations).
[7] A detective constable.

not one of the petitioners), located and viewed the aforementioned WhatsApp messages[8], alleged by the respondents to be, *inter alia*, sexist, racist and homophobic, on the mobile phone of the constable under investigation. It was not disputed by the petitioners that three of them were members of the first WhatsApp messaging group to which the constable under investigation belonged nor that all were members of the second WhatsApp group when the messages had been shared within the respective groups. Whilst the petitioners were at no point suspected of any criminal activities, the investigating officer passed the messages to the Police Service of Scotland Professional Standards Department[9] in accordance with the 2014 Conduct Regulations further sch.1 requirement for constables to "report conduct of other constables which has fallen below the Standards of Professional Behaviour."[10]

Prior to considering Lord Bannatyne's reasoning per the petitioners respective heads of claim, it is prudent to chart, in brief, the evolution of the law of breach of confidence since the Human Rights Act 1998 [HRA] came into force. Likewise, it is instructive to note at this point that whilst the action can trace its origins back to decisions of English courts of equity, in *Lord Advocate v Scotsman Publications Ltd*[11] Lord Keith explicitly stated that the law of breach of confidence, [at that time], was considered to be the same in Scotland, irrespective of the fact that the cause of action derived from differing juridical origins.[12]

3. Breach of Confidence

Traditionally, an action for breach of confidence required that a 'secret', subsequently made public by a confidant, had been communicated by the confider in circumstances where a duty on the confidant to maintain the confidence could be implied.[13] Some sort of prior relationship[14], between the parties was thus a pre-requisite.[15] Moreover, the traditional action protected the information concerned, rather than any privacy right claimed by the complainer.[16] However, post-enactment of the HRA, Lord Nicholls, in *Campbell v Mirror Group Newspapers Limited*,[17] recognised the existence of a common law right of privacy on the basis that the "values embodied in art.8... are as much applicable in disputes between individuals or between an individual and a non-governmental body ... as they are in disputes between individuals and a public authority."[18] In doing so, he dispensed with the requirement for the complainer to establish a prior relationship with the confidant concluding that a new head of claim, misuse of private information,[19] would sit within the broader rubric of the traditional law of breach of confidence. Said action would, henceforth, operate alongside, but independently of, the right to challenge public authorities for alleged non-observance of the rights detailed in art.8(1) ECHR.[20]

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[8] Some messages shared were accompanied by photographs showing crime scenes from [then] current police investigations.
[9] Hereinafter referred to as the Professional Standards Department.
[10] Police Service of Scotland (Conduct) Regulations 2014, (SSI 2014/68) sch.1, reg.2.
[11] *Lord Advocate v Scotsman Publications Ltd* 1989 S.C. (HL) 122.
[12] *Lord Advocate,* 1989 S.C. (HL) 122 at [164].
[13] *Prince Albert v Strange* (1849) 47 E.R. 1302, see Lord Cottingham at [1311].
[14] Generally a contractual relationship.
[15] See Megarry J in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at [47-48].
[16] *Kaye v Robertson* [1991] FSR 62. "It is well known that in English law there is no right to privacy, and accordingly there is no right of action for breach of a person's privacy." Per Glidewell LJ at [66].
[17] *Campbell v Mirror Group Newspapers Limited* [2004] UKHL 22 at [13-14].
[18] *Campbell,* [2004] UKHL 22 at [17]. The HRA only imposing a duty on public authorities not to act in contravention of any Convention right.
[19] Which was defined by Lord Nicholls at [12] as "one aspect of invasion of privacy."
[20] In doing so Lord Nicholls cited with approval Lord Goff in *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 A.C. 109 at [281] where he had stated that there may also be circumstances where a duty of confidence will arise when confidential matters were made public by third parties.

The primary issue for determination henceforth in a misuse of private information action would be for a court to establish if the complainant had a "reasonable expectation of privacy" [21] in the circumstances. *Campbell* was decided shortly before *von Hannover v Germany*[22] where the ECtHR found in favour of the applicant on the basis she had a "legitimate expectation of privacy" [23] per art.8(1) which outweighed the public interest in making aspects of her private life public in the media. The *von Hannover* legitimate expectation test, (which Lord Toulson in *In re JR38*[24] held to be on all fours with Lord Nicoll's reasonable expectation test in *Campbell*),[25] was henceforth adopted by English courts as the starting point for the determination of misuse of private information claims whether at common law and/or when art.8(1) is invoked.

4. The first question: a right of privacy and the common law of Scotland

The first strand of the petitioners' argument was to the effect that the Supreme Court, when reflecting post-*Campbell*, on the impact of the HRA on pre-existing common law rights, in *R (Osborn) v Parole Board*[26] had concluded that recourse to the latter should be made in the first instance "as opposed to immediate resort to Convention rights."[27] In essence, it was argued that Lord Reed (with whom the rest of the court in *Osborn* agreed) did not consider human rights as a body of law to begin and end with the jurisprudence of the ECtHR. Accordingly, it was put to Lord Bannatyne that if it were to be accepted that development of the law of breach of confidence in England was mirrored in Scotland,[28] the approach taken by Lord Nicholls in *Campbell* stood as persuasive authority for the proposition that recognition of a privacy claim for misuse of private information was a natural extension of Scots common law.
The second strand directly addressed prior judicial discussion of 'privacy' as a fundamental right in Scotland with the petitioners drawing the court's attention to *Henderson v Chief Constable of Fife*[29] and *Martin v McGuinness*[30] where it was argued the respective courts had implicitly recognised such a right.

Discussion

Lord Bannatyne began his judgment by considering the relationship between Convention rights and the common law by citing Lord Reed in *Osborn* who had stated; "The importance of the Human Rights Act is unquestionable. It does not however supersede the protection of human rights under the common law... or create a discrete body of law based on the judgements of the

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[21] *Campbell,* [2004] UKHL 22 at [21]. When separately addressing *Campbell's* argument that her art. 8(1) right to a private life had been violated by press intrusion and publication of information concerning a health matter, Lord Nicholls, approving the dicta of Lord Woolf CJ in *A v B plc* [2003] Q.B. 195, at [4], stated at [16-17] that the law of confidence had been in an evolutionary state since the HRA came into force and that the values enshrined in art.8 (1) had been incorporated into the law of confidence.
[22] *von Hannover v Germany* (2005) 40 EHRR 1.
[23] *von Hannover,* (2005) 40 EHRR 1 at [78].
[24] *In re JR38* 2016 A.C. 1131.
[25] *In re,* 2016 A.C. 1131 at [87].
[26] *R (Osborn) v Parole Board* [2014] A.C. 1115. See Lord Reed at [55]. "The guarantees set out in the...Convention... are mostly expressed at a very high level of generality. They have to be fulfilled at national level through a substantial body of much more specific domestic law... The guarantee of a right to respect for private and family life, under article 8, is fulfilled primarily through rules and principles found in such areas of domestic law as the law of tort, family law and constitutional law... the protection of human rights is not a distinct area of the law, based on the case law of the European Court of Human Rights, but permeates our legal system.".
[27] *B C and Others,* [2019] CSOH 48 at [9].
[28] See Lord Keith in *Lord Advocate,* 1989 S.C. (HL) 122 at [162-163].
[29] *Henderson v Chief Constable of Fife* 1988 S.L.T. 361.
[30] *Martin v McGuinness* 2003 S.L.T. 1424.

European Court. Human Rights continue to be protected by domestic law, interpreted and developed in accordance with the Act when appropriate." [31]
Lord Bannatyne was thus persuaded that the correct approach when called upon to interpret and potentially develop the common law of Scotland was to view the jurisprudence of the ECtHR as a resource to be drawn upon to inform the development of pre-existing fundamental rights rather than a supreme form of law that questioned the (continued) existence of such rights. Having determined that the HRA does not supplant the common law,[32] he then addressed the argument re the pre-existence of privacy as a fundamental right in Scotland. In doing so, he declined to accept the respondents' argument[33] that whilst *Campbell* had developed the law of confidence to recognise misuse of private information as a sub-species within the broader rubric of the law of confidence, the House of Lords had not sought to create a free standing common law right to privacy; such a right was inexorably linked to the House's interpretation of the statutory rights defined in art.8(1).[34] Rather, Lord Bannatyne held that *Campbell* was decided on the basis of "the values"[35] underpinning art.8(1) which the House of Lords had accepted should be mirrored in the development of the common law, opining ; "Taking as a starting point the cause of action; breach of confidence and applying the above approach to Convention rights to that cause of action I am persuaded that the Scottish courts would reach the same conclusion as the English courts in respect to the issue of the existence of a common law right of privacy."[36] Lord Bannatyne then went on to state that it would be "very odd", [37] given the undoubted comity between the law of confidence in England and Scotland,[38] that in such a "fundamental matter" [39] they would differ.

Lord Bannatyne then turned his attention the petitioner's further argument[40] which was that whilst it was conceded there was no reported Scottish case where a common law right to privacy had explicitly been recognised, implicit recognition could be discerned from either, or both, *Henderson* and *Martin*. *Henderson* was decided before the HRA came into force and saw the Inner House hold that the pursuer had been subjected to a wrongful search. The significance of *Henderson* is to be found in the judgment of Lord Jauncey. There he opined that, in the circumstances, forced removal of the pursuer's underwear was an unlawful "interference with privacy"[41], noted by Lord Bannatyne[42] to be a similar type of [unlawful] conduct highlighted by Lord Nicholls in *Campbell* [43] [discussing a strip search] when considering the broad range of activities which could give rise to an invasion of privacy, at English common law. Subsequently, in the post- HRA Outer House case of *Martin v McGuinness*[44] one strand of the pursuer's argument, re invasion of privacy,[45] having earlier conceded that s.8(6) of the HRA only allowed for damages to be awarded against a public authority for a breach of art.8(1), was that damages

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[31] *R (Osborn),* [2014] AC 1115 at [57].
[32]For a fuller discussion of *R (Osborn),* [2014] AC 1115 see Professor Mark Harris, "Osborn: The common law, the Convention, and the right to an oral hearing", (2013) available at *https://publiclawforeveryone.com/2013/10/10/osborn-the-common-law-the-convention-and-the-right-to-an-oral-hearing/* [Accessed 16 November 2019].
[33] *B C and Others,* [2019] CSOH 48 at [52-55].
[34] *B C and Others,* [2019] CSOH 48 at [53].
[35] See Lord Nicholls in *Campbell*, [2004] UKHL 22 at [17].
[36] *B C and Others,* [2019] CSOH 48 at [114].
[37] *B C and Others,* [2019] CSOH 48 at [116].
[38] See Lord Keith in *Lord Advocate,* 1989 S.C. (HL) 122 at [164].
[39] *B C and Others,* [2019] CSOH 48 at [116].
[40] *B C and Others,* [2019] CSOH 48 at [118-126].
[41] *Henderson,* 1988 S.L.T. 361 at [368].
[42] *B C and Others,* [2019] CSOH 48 at [122].
[43] *Campbell*, [2004] UKHL 22 at [15].
[44] *Martin v McGuinness* 2003 S.L.T. 1424.
[45] When private investigators were deployed to put Martin and his family under covert and intrusive surveillance for the purpose of reducing compensation per a personal injury claim.

would be recoverable for said interference by a private party at common law through the *actio injuriam.*[46] In his judgment, Lord Bonomy stated that "because a specific right to privacy has not so far been recognised [it does not follow] such a right does not fall within existing principles."[47] Describing Lord Bonomy's comment as "obiter and tentative"[48] Lord Bannatyne nevertheless was persuaded it lent credence to the second strand of the petitioner's argument that a right of privacy exists at common law in Scotland, noting that neither in *Martin* nor the instant case had the court been directed to any Scots authority which negated such a conclusion being drawn.[49] Accordingly, he concluded that "nascent recognition"[50] of a common law right to privacy could be gleaned from the foregoing Scottish authorities and that the right would be akin to those protected by art.8(1) and justiciable against both public and private parties in Scotland, as is now the position in England, post-*Campbell*.[51] This finding thus elucidates, (i) the right of Scottish domiciled claimants, independent of any rights conferred by the Convention, to now pursue a common law misuse of private information action against any person, natural or legal and, (ii), places private parties, in particular, on notice that proof of a prior confidential relationship, as demanded by the traditional law of breach of confidence, is no longer required. However, as a consequence, it also raises the question of how damages are to be calculated if a claim succeeds. This point is exemplified in *Gulati and ors v Mirror Group Newspapers Limited*[52]which was raised by individuals whose mobile phones had been 'hacked' by private investigators working for or on behalf of the Mirror Group. Although misuse of private information was admitted at first instance, the subsequent appeal, *Representative Claimants v Mirror Group Newspapers Limited*[53] concerned the calculation of damages in such cases. The Mirror Group argued that damages for distress only were recoverable and that the awards made in *Gulati* were "disproportionate" when compared "with the less generous approach adopted by the Strasbourg Court."[54] Lady Justice Arden's judgment makes it clear that a court, when making an award for misuse of private information, is not proceeding under s.8 of the HRA or Article 41 of the Convention, where compensatory 'just satisfaction' does not recognise aggravated or exemplary awards.[55] The question of the measure of damages is, Lady Arden concluded, "more naturally a question for English domestic law"[56] and need not be governed by the approach taken by the Strasbourg court. The awards of aggravated damages made to certain individuals in *Gulati* were upheld.

5. The second question: art.8(1) ECHR and reasonable/legitimate expectation of privacy

In the alternative, the petitioners had argued[57] that art.8(1) was engaged[58] as messages sent to and received by a limited number of correspondents of a closed messaging group was a form of correspondence to which a legitimate expectation of privacy adhered, notwithstanding their position as police constables. This point was expanded upon by reference to Lord Toulson's

[46] *Martin,* 2003 S.L.T. 1424 at [27]. Here the defender was a private citizen.
[47] *Martin,* 2003 S.L.T. 1424 at [28].
[48] *B C and Others,* [2019] CSOH 48 at [123].
[49] *B C and Others,* [2019] CSOH 48 at [125].
[50] *B C and Others,* [2019] CSOH 48 at [124].
[51] *B C and Others,* [2019] CSOH 48 at [123].
[52] *Gulati and ors v Mirror Group Newspapers Limited* [2015] EWHC 1482.
[53] *Representative Claimants v Mirror Group Newspapers Limited* [2015] EWCA Civ 1291.
[54] *Representative Claimants*, [2015] EWCA Civ 1291 at [9].
[55] Lady Arden noted at [80] that Article 41 is 'reflected' in s.8 of the HRA.
[56] *Representative Claimants*, [2015] EWCA Civ 1291 at [89].
[57] *B C and Others,* [2019] CSOH 48 at [13-36].
[58] Police Scotland being a public authority.

discussion of the *von Hannover* legitimate expectation test in *In re JR38* [59] where he had placed emphasis on the requirement to consider the "width of the concept of private life"[60] when considering a specific individual's legitimate expectation. In doing so, it was argued, Lord Toulson had approved the dicta of Laws LJ in *R (Wood) v Commissioners of Police of the Metropolis*[61] who re-iterated that the concept of private life may encompass a person's "physical and psychological identity"[62] or, in the alternative, their "physical and social identity".[63] In the context of the instant case, the petitioners, it was argued, had a legitimate expectation of privacy in their social "zone of interaction"[64] with other members of a "closed"[65] thus non-public WhatsApp messaging group.

The respondents' position[66] was that no legitimate (reasonable) expectation could arise given;

(i) the content of the messages[67] and the fact that certain of same related "to matters which arose during their professional lives... as police officers"[68],

(ii) the restrictions placed on the petitioners by the Standards of Professional Behaviour, detailed in para.1, sch.1 of the 2014 Conduct Regulations[69],

(iii) the further duties imposed by para.4(1) and sch.1 of the 2013 Police Service Regulations[70] and

(iv) the declaration made by a constable prior to taking up their appointment that they would discharge their duties with, "fairness, integrity, diligence and impartiality" and "uphold fundamental human rights whilst according equal respect to all people, according to law."[71]

The phrase, 'according to law', it was argued, naturally encompassed compliance with the Standards of Professional Behaviour detailed in para.1, sch.1 of the 2014 Conduct Regulations and sch.1 of the 2013 Police Service Regulations.

Discussion

Whilst the respondent had argued that the WhatsApp messaging service feature allowing members of a closed group to engage in "group chats"[72] undermined each individual member's reasonable expectation that their contributions to the group chat would remain private[73] Lord Bannatyne[74] held that the messages exchanged between the petitioners and others, irrespective of their distasteful content, were a form of correspondence which fell within a recognised, thus

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[59] *In re,* 2016 A.C. 1131 at [87].
[60] *In re,* 2016 A.C. 1131 at [85].
[61] *R (Wood) v Commissioners of Police of the Metropolis* [2010] 1 W.L.R. 123 at [16-25].
[62] *von Hannover,* (2005) 40 E.H.R.R. 1 at [50].
[63] *S v United Kingdom* (2009) 48 E.H.R.R. 50 at [66].
[64] *von Hannover,* (2005) 40 E.H.R.R. 1 at [50].
[65] *B C and Others,* [2019] CSOH 48 at [137].
[66] *B C and Others,* [2019] CSOH 48 at [56-80].
[67] Described by the respondents as 'abhorrent' at [71].
[68] *B C and Others,* [2019] CSOH 48 at [61]. This strand of the respondents' argument was augmented by making reference to Lord Toulson's remarks in *In Re JR38* at [97-100] concerning legitimate expectation and circumstance.
[69] In particular the Standards referring to equality, diversity and the obligation to refrain from discreditable conduct, whether on or off duty.
[70] "A constable must at all times abstain from any activity which is likely to interfere with the impartial discharge of that constable's duties or which is likely to give rise to the impression amongst members of the public that it may so interfere...".
[71] Police and Fire Reform (Scotland) Act 2012, s.10.
[72] To discuss the content of the messages exchanged.
[73] *B C and Others,* [2019] CSOH 48 at [140].
[74] Noting for the record at [127] that Police Scotland, as a public authority, was subject to s.6(1) of the HRA which makes it "unlawful for such a body to act in a way which is incompatible with a Convention right."

protected, art.8(1) zone of interaction.[75] In doing so, he disagreed with the respondent's broad proposition that "nobody joining a WhatsApp group could have any reasonable expectation of privacy."[76] Firstly, and as a matter of general principle, he distinguished private messages exchanged within a "group where membership is controlled" [and within] a "confidential context"[77] from messages sent via [other] messaging services providing unrestricted public access to such correspondence, drawing no distinction between private information shared in person from private information shared virtually thus;

"I accept that it may happen that a person who joins a WhatsApp group makes public the content of what has been exchanged within the group. However, equally in the example I gave[78] where confidences were exchanged in a house between friends one of these friends may breach the confidence. That does not undermine the individual's reasonable expectation of privacy. The exchanging of any information in a private context always carries with it the risk of breach of the confidence."[79] Thus it was held that the "characteristics"[80] of WhatsApp (as a private messaging service) meant "an ordinary member of the public using such could have a reasonable expectation of privacy."[81]

However, when considering the prime question of individual expectation of privacy, when measured against the yardstick of the reasonableness of that expectation, Lord Bannatyne agreed with the respondents that the petitioners, as police constables, could have had no reasonable expectation of privacy per art. 8(1) or at common law.[82]

In doing so, he noted that in *In re JR38*, Lord Toulson[83] had approved the approach taken by Clarke MR in *Murray v Big Pictures*[84] when considering the factors to be taken into account when assessing reasonableness, the question being "... a broad one which takes account of all the circumstances... including the attributes of the claimant, the nature of the activity in which the claimant is involved, the place at which it is happening, and the nature and purpose of the intrusion."[85]
By accepting these factors as valid considerations and Clarke MR's further commentary in *Murray* that reasonable expectation is to be determined by having a sharp focus on the sensibilities of the reasonable person in the shoes of the complainant,[86] Lord Bannatyne held that when considering the question of reasonableness a court, before giving answer, had to be mindful the question must be approached objectively.[87] Accordingly, he reasoned that the requirements of the 2013 Police Service Regulations and 2014 Conduct Regulations distinguished the petitioners from ordinary members of the public[88] and, on the facts, the petitioners, as police constables, could not reasonably have expected the content of their communications, upon discovery, to remain private.[89] On this point, he made it clear that the Standards of Professional Behaviour/2013 Police Service Regulations did not dictate that a police constable, by virtue of office, could never

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[75] *B C and Others,* [2019] CSOH 48 at [129] and [157].
[76] *B C and Others,* [2019] CSOH 48 at [141].
[77] *B C and Others,* [2019] CSOH 48 at [137].
[78] *B C and Others,* [2019] CSOH 48 at [140].
[79] *B C and Others,* [2019] CSOH 48 at [142].
[80] *B C and Others,* [2019] CSOH 48 at [150].
[81] *B C and Others,* [2019] CSOH 48 at [150].
[82] *B C and Others,* [2019] CSOH 48 at [173].
[83] *In re JR38,* 2016 A.C. 1131 at [88].
[84] *Murray v Big Pictures* [2008] EWCA 446
[85] *Murray,* [2008] EWCA 446 at [36].
[86] *Murray,* [2008] EWCA 446 at [35] where Clarke MR quoted Lord Hope in *Campbell*, [2004] UKHL 22 at [99].
[87] *B C and Others,* [2019] CSOH 48 at [134].
[88] *B C and Others,* [2019] CSOH 48 at [166].
[89] *B C and Others,* [2019] CSOH 48 at [164].

enjoy a reasonable expectation of privacy. However, such expectation would be a limited one if any (potential) infraction of the Standards were to arise in an officer's private life and raise doubts as to their impartiality in professional life. [90]

6. The third and fourth questions: was disclosure of the messages in accordance with law/was interference necessary per art.8(2)?[91]

The petitioners' position was that no clear and accessible legal basis existed for their private WhatsApp messages to be disclosed to the Professional Standards Department for the purpose of disciplinary proceedings and that, in any event, none of the legitimising conditions in art.8(2)[92] permitting interference with their art.8(1) rights applied in the circumstances.[93]
For the respondents it was argued that non-compliance with any of the Standards of Professional Behaviour detailed in para.1, sch.1 of the 2014 Conduct Regulations[94]provided a lawful basis for the reporting[95] of the conduct concerned to the appropriate authority and that all art.8(2) conditions were directly engaged.[96]

Discussion

Lord Bannatyne did not find a potential breach of the standards *per se*, as suggested by the respondents, to answer the primary issue, that of the lawfulness of disclosure of private correspondence for a secondary purpose.[97] Rather, he cited *Woolgar v Chief Constable of Sussex Police*[98] where the court had followed the approach taken by Browne-Wilkinson VC, at first instance, in *Marcel v Commissioner of Police*[99] when called upon to consider when onward transmission of information obtained in the course of a specific investigation for use in another would be lawful.[100] In *Woolgar*, Kennedy LJ[101] considered that *Marcel* [102] permitted subsequent disclosure of information to other public authorities in an appropriate case and this was subsequently exemplified in *R v Chief Constable of North Wales ex parte AB*[103] where Buxton J[104] held that one such legitimising ground, notwithstanding Convention rights, was that secondary disclosure was in the public interest. Lord Bannatyne was thus persuaded that it was lawful for

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[90] *B C and Others,* [2019] CSOH 48 at [168].
[91] Whilst these questions did not fall to be directly considered, given the petitioners case failed on the question of reasonable/legitimate expectation, the court did go on to consider same. Accordingly, Lord Bannatyne's discussion of these aspects of the pleadings are summarised below.
[92] There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.
[93] *B C and Others,* [2019] CSOH 48 at [38-50].
[94] In the instant case the Standards requiring constables to act with fairness, impartiality and not to discriminate unlawfully or unfairly and the obligation to "behave in a manner which does not discredit the Police Service or undermine public confidence in it, whether on or off duty" were of relevance.
[95] The requirement for constables to..."challenge or take action against the conduct of other constables which has fallen below the Standards of Professional Behaviour."
[96] *B C and Others,* [2019] CSOH 48 at [96-98].
[97] *B C and Others,* [2019] CSOH 48 at [179].
[98] *Woolgar v Chief Constable of Sussex Police* [2000] 1W.L.R. 25.
[99] *Marcel v Commissioner of Police* 1992 2 All ER 72 at [81].
[100] *B C and Others,* [2019] CSOH 48 at [183].
[101] *Woolgar*, [2000] 1 WLR 25 at [7].
[102] Where the issue was also to determine the circumstances in which police officers were permitted to disclose documents that had come into their possession during a criminal investigation to another party for use in a civil matter.
[103] *R v Chief Constable of North Wales ex parte AB* 1999 QB 396.
[104] *R v Chief Constable of North Wales ex parte AB* 1999 QB 396 at [415B].

the detective constable investigating the alleged sexual offences against another police constable to pass the WhatsApp messages recovered during that investigation to the Professional Standards Department for consideration re a strictly limited purpose[105] "... in order to have a properly and efficiently regulated police force and...to protect the public."[106]
Turning then to the pleadings per the necessity and proportionality of interference with the petitioners' art.8(1) rights, Lord Bannatyne held that the respondents' argument per interference would succeed on two specific art.8(2) legitimising conditions; interference was necessary on the grounds of public safety and for the prevention of disorder or crime, linking the issue of loss of public confidence in the police[107] with the efficient operation of the police service and the prevention of disorder or crime thus;

"If the public loses confidence in the police in this way then public safety would be put at risk as the police cannot operate efficiently without such public confidence. This fits in with an intervention being necessary for the prevention of disorder of crime. The police, if the public loses confidence in them, are less likely to be able to prevent disorder or crime.'[108]
On the attendant question of proportionality Lord Bannatyne held that if he had found that the petitioners enjoyed a legitimate expectation of privacy, disclosure of the WhatsApp messages would not have been disproportionate given they were made available for a limited and lawful purpose[109] and there was no obvious less intrusive method of interference which could have been employed to alert the professional standards department as to their existence.

7. Comment

Whilst this case has attracted attention for the headline ruling (at least in legal circles) that a right of privacy exists at common law in Scotland, Lord Bannatyne's judgment on this point, notwithstanding the preponderance of persuasive authority he relied on, appears, in this writer's opinion, sound . However, if the arguments put forward by the petitioners re the weight to be given to Lord Keith's view in *Lord Advocate v Scotsman Publications Ltd* that the law of confidence in Scotland has developed in tandem with that of England[110] and Lord Reed's view in *R (Osborn) v Parole Board* that the protection of fundamental [human] rights did not come into existence with the ratification of the Convention, were not to find favour on appeal, it would be somewhat surprising if *Henderson v Chief Constable of Fife* and *Martin v McGuinness* failed to provide sustainable argument that a right of privacy is (or ought to be?) a fundamental common law right in Scotland. Indeed, the respondents' reply on this ground was noted by Lord Bannatyne to be "a short one"[111] and predicated on the (unsuccessful) argument that none of the authorities (English or Scottish) cited by the petitioners established same. On the matter of the correct approach re the calculation of damages for misuse of private information in Scotland, given the petitioners' common law claim did not succeed, this remains unclear. However, if Scottish courts were to follow the approach taken by Lady Arden in *Representative Claimants v Mirror Group Newspapers Limited* per *Gulati* where aggravated damages were awarded it may prove more lucrative, if the defender is a public authority, to raise a common law claim alone or perhaps in tandem with an art.8(1) ECHR claim.

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[105] *B C and Others,* [2019] CSOH 48 at [188].
[106] *B C and Others,* [2019] CSOH 48 at [193].
[107] Given, it was reasoned, the content of the WhatsApp messages could erode public confidence re fair treatment which in turn could undermine public safety. See Lord Bannatyne at [199-200] and also commentary below re the public interest defence v. iniquitous behaviour in private life.
[108] *B C and Others,* [2019] CSOH 48 at [198].
[109] To comply with the 2014 Conduct Regulations requirement for constables to report conduct of other constables which [may] have fallen below the required Standards of Professional Behaviour. See Lord Bannatyne at [201].
[110] See again Lord Nicholls in *Campbell*, [2004] UKHL 22 at [13].
[111] *B C and Others,* [2019] CSOH 48 at [52].

On the other hand, Lord Bannatyne's interpretation of the legitimate (reasonable) expectation test, which he opined was the appropriate test whether the question of legitimacy required to be answered per art.8(1) or the (newly established) common law right, may provide fertile ground for challenge.

Whilst accepting that art.8(1) was engaged for the reasons narrated above, by placing the petitioners, as police constables, in a hypothecated category set within the context of the public at large when assessing reasonableness of expectation it may be arguable that Lord Bannatyne fell into error. While he was careful to say that there would be circumstances in which the expectation of a police constable would be the same as that of an ordinary member of the public,[112] the crux of the matter, on appeal, would likely be his approach when considering, objectively, the factors to be taken into account when assessing reasonableness. It will be recalled that in *Murray v Big Pictures*,[113] which was cited with approval by Lord Toulson's in *In Re JR38*,[114] Clarke MR considered the question to be a broad one which takes account of all the circumstances, including "the attributes of the claimant, the nature of the activity in which the claimant is involved, the place at which it is happening, and the nature and purpose of the intrusion."[115]

Given that the content of the WhatsApp messages were not illegal, were exchanged in what was accepted by Lord Bannatyne to be a confidential context,[116] and they only fell in to the public domain[117] when obtained by the respondents by virtue of an unrelated internal police investigation, it could be argued that the judgment gave disproportionate weight to the attributes of the petitioners as police constables and conflated the contextual question of their legitimate expectation of privacy with a hypothetical desire to serve the public interest by maintaining, again hypothetically, public confidence in the impartiality of the police service.

If the decision, insofar as it relates to reasonable expectation of privacy, stands or is affirmed, it will be interesting to see if its reach is confined to those individuals whose employment status makes them subject to statutory standards of behaviour or if it will be extended, in due course, to any employee (or perhaps independent contractor) subject to a contractual term and/or code of conduct where the commercial and/or reputational interests of an entity could theoretically be adversely affected by lawful but non-contractually and/or code compliant private activities.

Further, if an appeal does go ahead it is to be hoped the Inner House would go on to review the approach taken by Lord Bannatyne to the subsequent questions of the requirement for a clear and accessible basis for disclosure of private information by a third party for a secondary purpose and the proportionality of any such intrusion. As essential factors in the determination of misuse of private information cases where legitimate/reasonable expectation has been established, further examination of the correct approach when applying the public interest test via a firm focus on prior authorities dealing with iniquity in private life which, as memorably stated by Lord Wilberforce in *British Steel Corporation v Granada Television Limited*,[118] is underpinned by the premise that "there is a wide difference between what is interesting to the public and what is in the public interest to make known"[119] would be welcome

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[112] *B C and Others,* [2019] CSOH 48 at [129] and [157].

[113] *Murray,* [2008] EWCA 446.

[114] *In re,* 2016 A.C. 1131 at [88].

[115] *Murray,* [2008] EWCA 446 at [36].

[116] *B C and Others,* [2019] CSOH 48 at [137].

[117] That is to say they were no longer private.

[118] *British Steel Corporation v Granada Television Limited* [1981] A.C. 1096.

[119] *British Steel Corporation,* [1981] A.C. 1096 at [1168]. On this point see also Stephen LJ in *Lion Laboratories v Evans* [1985] Q.B. 526 at [537] where, he expanded on Lord Wilberforce's comment thus; "The public are interested in many private matters which are no real concern of theirs and which the public have no pressing need to know." For a full discussion of the law of confidence, the public interest defence and iniquity see Kaaren Koomen, "Breach of

confidence and the public interest defence: Is it in the public interest? A review of the English public interest defence and the options for Australia", (1994) 10 Queensland U. Tech. L.J. 56 at pp. 56-88.